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NEOH KIEN TENG v. L & L GLASS ALUMINIUM TRADING SDN BHD; ASTON STAR SDN BHD (INTERVENER)

HIGH COURT MALAYA, SHAH ALAM
VAZEER ALAM MYDIN MEERA J
[COMPANIES WINDING-UP NO: BA-28NCC-299-07-2016 &
B POST WINDING-UP APPLICATION NO: WA-28PW-56-11-2017]
3 SEPTEMBER 2018

C ***COMPANY LAW:*** *Liquidation – Assignment – Developer appointed sub-contractor to supply, deliver and install certain works for project – Developer advances money to sub-contractor when sub-contractor experienced cash flow problems – Developer's solicitor/stakeholder to forward net proceeds due to developer under sale and purchase agreement to intervener in full or partial extinguishment of advance – Developer wound up – Developer and liquidator laid claim to stakeholder sum – Whether stakeholder sum fell under ss. 293 of Companies Act*
D *1965 and/or 528 of Companies Act 2016 read together with ss. 52 and/or 53 of Bankruptcy Act 1967*

The intervener, the developer of a commercial and residential project ('the project'), appointed the respondent as a sub-contractor to, *inter alia*, supply, deliver and install certain works for the project. The respondent
E experienced cash flow problems and informed the intervener that the respondent's bank accounts for the project would be frozen and its business operations would be severely affected if the respondent did not remit the sum of RM5.6 million into the respondent's Maybank Islamic Bhd account ('Maybank account') as repayment of an outstanding loan facility. Upon the
F respondent's request, the intervener agreed to advance the sum of RM5.6 million and paid the same into the Maybank account. In the respondent's letter dated 7 April 2016, the respondent informed the intervener that (i) the respondent's solicitor ('stakeholder') in the sale and purchase agreement ('the SPA') shall forward the net proceeds due to the
G respondent under the SPA to the intervener in full or partial extinguishment of the advance; (ii) as security for the advance of RM5.6 million, the respondent agreed to charge a piece of its land ('land No. 1') to the intervener and the intervener shall be entitled to enter a private caveat over land No. 1 pending registration of the charge; and (iii) in the event the intervener
H was unable to enter a private caveat or register a charge over land No 1, the intervener is entitled to create a charge over another piece of the respondent's land ('land No. 2') and also be entitled to enter a private caveat over land No. 2 pending registration of the charge. By another letter to the stakeholder, the respondent irrevocably authorised the stakeholder to release the net proceeds under the SPA to the intervener. Relying on the arrangement
I between the parties, the intervener then paid the advance sum of RM5.6 million into the respondent's Maybank account. Dispute arose when the purchaser in the SPA did not agree to vary the terms of the SPA to

incorporate this suggested amendment. The stakeholder received RM2,480,000 pursuant to the terms of the SPA and after deduction of all permitted payments amounting to RM1,337,924.73, the stakeholder had, in its possession, the net sum of RM1,142,075.27 ('the stakeholder sum'). The respondent was wound up and, as both the intervener and liquidator laid a claim to the stakeholder sum, the stakeholder filed for directions from the court as to whom the stakeholder sum ought to be released to ('suit 170'). The parties to suit 170 entered into a consent order and agreed that (i) the stakeholder sum be deposited into the High Court pending disposal on an application to be made for the determination of ownership to the stakeholder sum; and (ii) the liquidator shall file an application in the winding-up court seeking directions for the entitlement of the stakeholder sum. Following the consent order, the stakeholder deposited the stakeholder sum into court. The present application for directions arose from the consent order. The primary issue for the court's adjudication was whether the stakeholder sum fell under ss. 293 of the Companies Act 1965 and/or 528 of the Companies Act 2016 ('the CA') read together with ss. 52 and/or 53 of the Bankruptcy Act 1967 ('the BA').

Held (dismissing application):

(1) There is a valid assignment of the net proceeds due under the SPA from the respondent to the intervener. The assignment was absolute to the requirements of s. 4(3) of the Civil Law Act 1956 in that (i) it was writing under the hand of the assignor, namely the respondent; (ii) the assignment was absolute and not by way of charge only; and (iii) express notice in writing of the assignment has been given to the debtor/respondent, trustee/stakeholder, again by the exchange of the correspondence between the relevant parties. (para 27)

(2) When all the letters were construed as a whole, it was evident from the language used that an absolute assignment had been created. The net proceeds under the SPA had, in its entirety, been absolutely and irrevocably assigned by the respondent to the intervener. The intention of the respondent was very clear from these documents that it shall no longer have any right to the proceeds of the sale under the SPA. An equitable assignment existed as there was a clear intention on the part of the respondent to convey/assign its rights to the net proceeds of the sale under the SPA to the intervener. (paras 27 & 28)

(3) The fact that the sums due under the assignment could not be ascertained at the time of the assignment, because the lawful deductions to be made from the balance purchase price were not determined then, did not invalidate the assignment. The respondent had irrevocably instructed the stakeholder to pay the entire net proceeds of the sale under the SPA to the intervener and that was the crux of the matter. Once the stakeholder came to know or had acknowledged the instruction of intention of the assignor/respondent, they became trustee for that chose in action. (para 29)

(4) In order for s. 52 of the BA to apply, the liquidator needs to prove that the assignment was not made in good faith or done without valuable consideration. However, there was no evidence showing that the assignment was not done in good faith or without valuable consideration. In fact, the contrary was evident; the assignment was made to ensure that the respondent's bank account was not frozen and that the project could proceed without affecting the progress of works. The intervener had also given valuable consideration for the assignment *ie*, the advance of RM5.6 million. (para 30)

(5) The liquidator had not fulfilled all the conditions for the application of s. 53 of the BA. In particular, there was no evidence that the respondent was insolvent when the arrangement was entered into. The fact that the respondent was faced with a temporary lack of liquidity, which required the advance of RM5.6 million from the intervener, could not be equated to insolvency. (para 31)

(6) The assignment was clearly to create security for payment of a larger advance. There was no element of 'unfairness' in the arrangement. The respondent had received a larger sum of RM5.6 million as compared to the net proceeds due under the SPA which was secured by the arrangement. Therefore, the arrangement in the letters dated 7 April 2016 was not intended to defraud or create an unfair advantage. The benefit that flowed from the assignment to the respondent and its creditors, as compared to that of the intervener, was obviously far greater. Such greater benefit would necessarily negate any suggestion of unfair advantage. (para 36)

(7) Section 223 of the CA was inapplicable because the stakeholder sum did not belong to the respondent as a result of the assignment and trust. The disposition of the chose in action, which in this case, was the assignment of the net sales proceeds under the SPA, was done prior to the commencement of the winding-up. (para 40)

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd [2001] 4 CLJ 572 HC ***(refd)***
Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
In Re Patrick [1891] 1 Ch 82 ***(refd)***
Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC ***(refd)***
Lee Chao Yong v. Siteman Construction Sdn Bhd [2016] 1 LNS 1134 CA ***(refd)***
Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***
Lin Securities v. Royal Trust Merchant Bank (Asia Limited) [1995] 1 SLR 97 ***(refd)***
Malayawata Steel Bhd v. Government Of Malaysia & Anor [1980] 1 LNS 45 PC ***(refd)***
Malaysian International Merchant Bankers Bhd v. Malaysian Airlines System Bhd [1982] CLJ 319; [1982] CLJ (Rep) 545 HC ***(refd)***
Palmer v. Culverwell, Brooks & Co (1902) 85 LT 758 ***(refd)***

PECD Bhd & Anor v. AmTrustee Bhd & Other Appeals [2010] 1 CLJ 940 CA ***(refd)***
PECD Bhd (In Liquidation) v. AmTrustee Bhd [2013] 9 CLJ 841 FC ***(refd)***
Pembinaan Lagenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal [2018] 1 LNS 172 CA ***(refd)***
Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***
Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor [2011] 8 CLJ 269 CA ***(refd)***
Rossiter v. Miller [1873] 3 AC 1124 ***(refd)***
Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor [2016] 7 CLJ 823 FC ***(refd)***
Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC ***(refd)***
Tan Way Boon & Ors v. Omar Marican Holdings Sdn Bhd & Ors [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202 HC ***(refd)***
Tay Hup Lian v. Histyle Sdn & Anor; Lim Hock Bee & Ors (Interveners) [2010] 1 LNS 418 HC ***(refd)***
Tee Siew Kai v. Affin Bank & Anor And Other Cases [2011] 1 LNS 18 HC ***(refd)***
UMW Industries (1985) Sdn Bhd (Formerly UMW (Malaya) Sdn Bhd) v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1965, ss. 52, 53(1)
Civil Law Act 1956, s. 4(3)
Companies Act 1965 (since repealed), ss. 223, 233(1), 237(3), 293
Companies Act 2016, ss. 487(3), 528

For the respondent – M/s S Ravenesan
For the petitioner – M/s Basharuddin Fa'izie Iskandar
For the intervener – M/s Mah-Kamariyah & Philip Koh

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] The liquidator by way of form of summons dated 10 November 2017 (encl. 1) applied for directions pursuant to s. 237(3) of the Companies Act 1965 and/or 487(3) of the Companies Act 2016 and/or the inherent jurisdiction of the court that:

(a) the sum of RM1,142,075.27 ("deposit sum") that has been deposited into court on 27 July 2017 be released to the respondent and that the deposit sum form part of the assets of the respondent to be dealt with under liquidation law;

(b) the instruction given by the directors of the respondent prior to liquidation *vide* letters dated 7 April 2016 to release the deposit sum to Aston Star Sdn Bhd is void pursuant to s. 293 of the Companies Act 1965 and/or s. 528 of the Companies Act 2016 read together with ss. 52 and/or 53 of the Bankruptcy Act 1967;

A (c) parties be at liberty to apply for other directions; and

(d) cost of the application be borne by Aston Star Sdn Bhd.

[2] The liquidator's grounds for making the application is as follows:

B (a) the deposit sum is at material times the asset of the respondent and as such, the liquidator should have custody and/or control of the deposit sum upon the liquidation of the respondent;

(b) the purported arrangement entered into between the directors of the respondent and Aston Star Sdn Bhd was made only three months prior to the presentation of the winding-up petition, and as such the deposit C sum cannot be released as the transaction is caught as the undue preference rule;

(c) the purported arrangement made by the directors of the respondent in directing its solicitors Messrs Yap Siew Yee & Co to release the deposit sum to Aston Star Sdn Bhd was made to confer Aston Star Sdn Bhd a D preference, priority or advantage over other unsecured creditors of the respondent.

[3] The intervener applied *vide* encl. 4 to intervene in the proceedings in connection with encl. 1 on grounds *inter alia* that:

E (a) the intervener had clear and direct interest in the subject matter of the form of summons, that is, the deposit sum;

(b) the intervener contended, amongst others, that the deposit sum is subject to a trust created either expressly or by implication in favour of the intervener, and as such the deposit sum does not form part of the estate F of the respondent to be distributed among the respondent's creditors.

Order in terms of encl. 4 was granted and Aston Star Sdn Bhd was allowed to intervene in the proceedings.

Background Facts

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[4] The intervener was the developer of a commercial and residential project known as project MK20 comprising:

(i) Block A-1 Block 37 Floor Hotels (275 rooms) and SOHO (628 units); and

H (ii) Block B-1 Block 19 Service Apartment (331 units)

with five underground floors and one basement floor at Lot 1881 and 1882, Jalan Mont Kiara, Kuala Lumpur ("project MK20").

[5] By way of a letter of award dated 8 April 2014 ("letter of award"), the I respondent was appointed as a sub-contractor by the intervener to amongst others, supply, deliver and install facade curtain wall, glazing and aluminum works for project MK20 ("sub-contract works").

[6] In or around January 2016, the respondent experienced cash flow problems and informed the intervener that the respondent's bank accounts for the purpose of project MK20 would be frozen and its business operations severely affected if the respondent did not remit the sum of RM5.6 million into the respondent's Maybank Islamic Berhad account ("Maybank account") as repayment of an outstanding loan facility.

[7] Having an interest to ensure that project MK20's progress is not affected, and upon request of the respondent, the intervener agreed to advance the sum of RM5.6 million and paid it into the Maybank account upon terms agreed to by parties as contained in several contemporaneous letters, which will be referred to shortly.

[8] The intervener asserts that the advance payment of RM5.6 million was made in good faith for a specific purpose, that is, for the benefit of unhindered progress of project MK20 and upon terms contained in the respondent's letter dated 7 April 2016 to the intervener (exh. CCL3 in the liquidator's supporting affidavit dated 10 November 2017).

[9] The relevant terms of the respondent's letter dated 7 April 2016 (exh. CCL3) are as follows:

(i) respondent had entered into a sale and purchase agreement dated 4 February 2016 for the sale of its property to one Hock & Company Rubber Products Sdn Bhd ("SPA") where the payment of the balance purchase price by the purchaser was pending. The respondent informed the intervener that the respondent's solicitors Messrs Yap Siew Yee ("stakeholder") in the SPA shall forward the net proceeds due to the respondent under the SPA to the intervener in full or partial extinguishment of the advance;

(ii) as security for the advance of RM5.6 million, the respondent agreed to charge a piece of its land held under HS(D) 34113, PT 35165 Mukim Tanjong Duabelas, Daerah Kuala Langat, Negeri Selangor ("land No 1") to the intervener and the intervener shall be entitled to enter a private caveat over land No. 1 pending registration of the charge;

(iii) in the event that the intervener is unable to enter a private caveat or register a charge over land No 1, then the intervener is entitled to create a charge over another piece of the respondent's land held under HS(D) 34114, PT 35166 Mukim Tanjong Duabelas, Daerah Kuala Langat, Negeri Selangor ("land No 2") and also be entitled to enter a private caveat over land No. 2 pending registration of the charge.

[10] The respondent by another letter dated 7 April 2016 (exh. CCL5) wrote to the stakeholder stating irrevocably authorising the stakeholder to release the net proceeds of the SPA to the intervener. The stakeholder by its letter dated 7 April 2016 acknowledged receipt of this letter of irrevocable letter of authorisation from the respondent. Copies of these letters were also

forwarded to the intervener. The intervener, relying on the aforesaid arrangement between parties then paid the advance sum of RM5.6 million into the respondent's Maybank account on 8 April 2016.

[11] By letter dated 12 April 2016, the intervener through their then solicitors, Messrs Lee Hishammuddin Allen Gledhill wrote to the stakeholder requesting that the net proceeds of the SPA payable to the intervener under the arrangement be paid to Messrs Lee Hishammuddin Allen Gledhill as the intervener's solicitors. The respondent instructed the stakeholder that they had no objections to the intervener's request for the net proceeds of the sale to be paid to Messrs Lee Hishammuddin Allen Gledhill. However, the purchaser in the SPA, ie, Hock & Company Rubber Products Sdn Bhd, did not agree to vary the terms of the SPA to incorporate this suggested amendment.

[12] The stakeholder subsequently received a sum of RM2,480,000 pursuant to the terms of the SPA, and after deduction of all permitted payments amounting to RM1,337,924.73, the stakeholder had in its possession the net sum of RM1,142,075.27 ("stakeholder sum").

[13] The respondent was wound up by order of this court on 28 September 2016 and Mr Chong Chuan Long was appointed as the liquidator of the respondent. As both the intervener and the liquidator laid a claim to the stakeholder sum, the stakeholder filed an interpleader summons *vide* Originating Summons No. BA-24NCVC-170-10-2016 ("suit 170") for directions from the court as to whom the stakeholder sum ought to be released. The parties to suit 170 entered into a consent order on 14 July 2017 upon the following terms:

(a) the stakeholder sum/deposit sum be deposited to the High Court of Shah Alam pending disposal on an application to be made for the determination of ownership to the stakeholder sum;

(b) the liquidator shall file an application in the winding-up court seeking directions for the entitlement of the stakeholder sum based on the following questions of law:

(i) Whether pursuant to the letter dated 7 April 2016 from the respondent to the stakeholder, there was a trust in favour of the intervener for the amount of RM1,125,958.36 arising from the balance sales proceeds amounting to RM1,142,075.27 being held by the stakeholder pursuant to the SPA;

(ii) Whether there was an assignment of the stakeholder sum, whereby the stakeholder is the assignor and the intervener is the assignee;

(iii) Whether the stakeholder sum has been earmarked from the outset to be given to the intervener when the intervener agreed to advance the sum of RM5.6 million to the respondent;

(iv) Whether s. 52 of the Bankruptcy Act 1967 and s. 293 of the Companies Act 1965 are applicable to set aside the arrangement contained in the respondent's letter of 7 April 2016 to the intervener;

(v) Whether s. 53 of the Bankruptcy Act 1967 and s. 293 of the Companies Act 1965 are applicable to set aside the arrangement contained in the respondent's letter of 7 April 2016 to the intervener; and

(vi) the parties be at liberty to include and/or raise additional questions of law deemed necessary arising from all of the affidavits filed in suit 170.

[14] Following the consent order, the stakeholder had on 27 July 2017 deposited the stakeholder sum/deposit sum into court. The present application for directions arises from the aforesaid consent order and the main issue for determination is whether the stakeholder sum falls under ss. 293 of the Companies Act 1965 and/or 528 of the Companies Act 2016 read together with ss. 52 and/or 53 of the Bankruptcy Act 1967.

[15] The intervener contends that the undisputed documentary evidence shows that the stakeholder sum is the subject of a "trust" created either expressly or by implication in favour of the intervener. In this respect, the developer proffers three broad basis for the creation of such trust:

(a) by way of assignment of chose in action;

(b) by express trust to be gathered from the undisputed documents; and

(c) by fact of earmark and implication of law, or a quistclose trust.

[16] Learned counsel for the intervener submits that a chose in action, which is defined as "a thing of which a person who has not the present enjoyment, but merely a right to recover it by action", is assignable by the person having that right to recover. This principle was confirmed in *Tay Hup Lian v. Histyle Sdn & Anor; Lim Hock Bee & Ors (Interveners)* [2010] 1 LNS 418; [2010] 9 MLJ 569, where the court held that a retention sum contractually payable at a future date is a chose in action and is capable of being assigned. Similarly, counsel contends that the stakeholder sum is a form of chose in action as it constitutes proceed arising from the SPA and the respondent has a right in law to recover it pursuant to the SPA and as such has the right to assign the stakeholder sum to the intervener.

[17] Learned counsel for the intervener further states that when an assignment, whether legal or equitable, is constituted, the debtor (in this case the respondent) or the fund holder (in this case the stakeholder) becomes trustee for the assignee (in this case the intervener). Section 4(3) of the Civil Law Act 1956 that governs the creation of an absolute assignment states:

A (3) *Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law*, subject to all equities which would have been entitled to priority over the right of the
B assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

C (emphasis added)

Thus, pursuant to s. 4(3) of the Civil Law Act 1956, an absolute assignment comes into being when three prerequisites are fulfilled, namely:

(i) the assignment must be in writing under the hand of the assignor;

D (ii) the assignment must be absolute and not by way of charge only; and

(iii) express notice in writing must have been given to the debtor, trustee or the person liable to the assignor under the assigned chose in action.

See *Tay Hup Lian v. Histyle Sdn & Anor; Lim Hock Bee & Ors (Interveners)*
E [2010] 1 LNS 418; *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996[1 CLJ 379; [1996] 1 MLJ 365.

[18] Learned counsel for the intervener submits that all three prerequisites for an absolute assignment have been met in this case, in that, firstly, the assignment is in writing as evidenced by the two letters dated 7 April 2016;
F secondly, the assignment is absolute as the language used in the two letters clearly convey the respondent's irrevocable intention that it shall no longer have any right to the stakeholder sum and that the intervener shall have sole beneficial interest/rights to the stakeholder sum; thirdly, notice of the assignment has been given to the stakeholder *vide* the letter dated 7 April
G 2016 by the respondent and confirmed by the stakeholder *vide* their letter dated 7 April 2016. Hence, learned counsel argues that by virtue of this absolute assignment, the stakeholder sum rightly belongs to the intervener.

[19] In addition to that, learned counsel for the intervener submits that over and above this absolute assignment, based on the undisputed facts, there
H is also an equitable assignment created and in this regard, learned counsel for the intervener has referred to the case of *Malaysian International Merchant Bankers Bhd v. Malaysian Airlines System Bhd* [1982] CLJ 319; [1982] CLJ (Rep) 545; [1982] 2 MLJ 59, where the court held that once a clear intention to convey/assign a "right" is demonstrated on the part of the assignor to the
I assignee, an equitable assignment is created. The court further held that the mere fact that there is still something to be done between the assignor and

assignee regarding the assignment such as to formalise the assignment in a deed or the fact that goods under the contract had not been fully supplied, did not bar the creation of an equitable assignment, once the debtor or stakeholder came to know or had acknowledged it. Thus, once the stakeholder has knowledge of the intention of the assignor, he becomes a trustee. (See *Rossiter v. Miller* [1873] 3 AC 1124, 1151; *Palmer v. Culverwell, Brooks & Co* (1902) 85 LT 758, 759; *In Re Patrick* [1891] 1 Ch 82; and *Malayawata Steel Bhd v. Government of Malaysia* [1980] 1 LNS 45; [1980] 2 MLJ 103).

[20] The liquidator on the other hand argues that by virtue of s. 233(1) of the Companies Act 1965, the liquidator shall take custody and/or control of the assets of the respondent. The liquidator states that any relationship of assignor and assignee and/or creation of trust as claimed by the intervener does not arise in this case as the alleged assignment and/or trust does not fulfil the conditions as to statutory assignment as envisaged pursuant to s. 4(3) of the Civil Law Act 1956 and/or the law of trust. The liquidator further states that arrangement between the intervener and the respondent does not amount to a creation of trust as there is no certainty of subject matter, as the balance sum due under the SPA to the respondent is subject to further instructions for deduction made by the directors of the respondent to the stakeholder. In this regard, learned counsel for the liquidator has referred to the case of *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635; [1996] 2 MLJ 369, where the Federal Court held that a trust must have three certainties, the first is the certainty of words, the second is the certainty of subject matter and the third is the certainty of object.

[21] In addition, the liquidator contends that the intervener had failed to obtain any validation order under s. 223 of the Companies Act 1965 from the winding-up court to validate the subsequent and/or separate arrangement and/or the transaction made with the director of the respondent after the transaction of the SPA which was made within the six months twilight period.

[22] Hence, the liquidator submits that in the absence of such assignment and/or trust, the contention of the intervener that the stakeholder sum ought to be released to the intervener is untenable in law as it invokes the undue preference rule as the arrangement between the respondent and intervener was only made on 7 April 2016 which is within six months prior to the commencement and/or the presentation of the winding-up petition. In this regard, learned counsel for the liquidator has referred the court to s. 53 of the Bankruptcy Act 1967 on fraudulent or undue preferences which is made applicable to companies by s. 293 of the Companies Act 1965. In this regard, learned counsel for the liquidator relies on the pronouncement of the Federal Court in *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557; [1998] 4 MLJ 569. Learned counsel

submits that all five requirements stipulated by the Supreme Court in *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449 for the setting aside of payments in run-up to bankruptcy or insolvency made in favour of a particular creditor which were designed to prefer him over other creditors are present in this case, that is:

(i) the impugned transaction took place within six months prior to the commencement of winding up;

(ii) the impugned transaction satisfies the description of one of the types of transaction mentioned in s. 53(1) of the Bankruptcy Act 1967;

(iii) the impugned transaction took place when the company was insolvent;

(iv) the intervener, in whose favour the impugned transaction was effected, stood as a creditor of the respondent;

(v) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding up.

[23] The liquidator further submits that any purported relationship of assignor and/or creation of trust as claimed by the intervener does not arise in the circumstance on the basis that there was no explicit and/or unequivocal intention on the part of the respondent to assign all of its rights, title and/or interest in the balance sum due under the SPA to the intervener in view of the subsequent instruction given to the stakeholder to deduct from the balance sum the renovation costs incurred by the purchaser. As such, learned counsel argues that there is no absolute assignment.

[24] Hence, the liquidator claims that the stakeholder sum ought to be released to the liquidator and not the intervener.

[25] In reply to that, learned counsel for the intervener submits that the provisions of s. 293 of the Companies Act 1965 read together with ss. 52 and/or 53 of the Bankruptcy Act 1967 do not apply in the present case.

[26] I am in agreement with the arguments raised by learned counsel for the intervener in this regard.

[27] Firstly, I find that there is valid assignment of the net proceeds due under the SPA from the respondent to the intervener. The assignment is absolute in that it conforms the requirements of s. 4(3) of the Civil Law Act 1956 in that:

(i) it is writing under the hand of the assignor, namely the respondent;

(ii) the assignment is absolute and not by way of charge only as can be seen from the respondent's instructions dated 7 April 2016 to the stakeholder; and

(iii) express notice in writing of the assignment has been given to the debtor/respondent, trustee/stakeholder, again by the exchange of correspondence between the relevant parties on 7 April 2016.

The Federal Court in *UMW Industries (1985) Sdn Bhd (Formerly UMW (Malaya) Sdn Bhd) v. Ah Fook* [1996] 1 CLJ 379; [1996] 1 MLJ 365 recognised that no particular form is necessary but it must be absolute, ie, one that purports to pass the entire interest of the assignor in the chose in action. Neither is it a requirement that the notice given to the debtor should necessarily have been given by the assignee. What is essential is that, there should be a document amounting to an absolute assignment in writing under the hand of the assignor. It would appear that where the parties to the assignment have exchanged more than one document, the court is entitled to look at all the documents to ascertain the existence of the assignment in writing under the hand of the assignor. See also the Federal Court decision in *Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 2 AMR 205.

In *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761, the Supreme Court held that:

> To determine if the assignment is conditional or absolute, the test of an absolute assignment should normally be only that it is one by which the entire interest of the assignor in the chose in action (such as the interest as claimed by the assignee herein) is, for the time being, transferred unconditionally to the assignee and placed completely under the assignee's control. Therefore, on a true construction of the agreements, the question is this, was the beneficial interest of the assignor in the estates of both the deceased father and the deceased mother transferred unconditionally to the assignee? If the answer is affirmative, the assignment is absolute.

Therefore, when all these letters dated 4 July 2018 are construed as a whole, it is quite evident from the language used that an absolute assignment has been created, wherein the net proceeds under the SPA has in its entirety been absolutely and irrevocably assigned by the respondent to the intervener. The intention of the respondent is very clear from these documents, that is, it shall no longer have any right to the proceeds of the sale under the SPA. See also *Tan Way Boon & Ors v. Omar Marican Holdings Sdn Bhd & Ors* [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202; [1991] 1 MLJ 122.

[28] Over and above that, I find that based on the undisputed facts, an equitable assignment exists as there is a clear intention on the part of the respondent to convey/assign its rights to the net proceeds of the sale under the SPA to the intervener. See: *Malaysian International Merchant Bankers Bhd v. Malaysian Airlines System Bhd* [1982] CLJ 319; [1982] CLJ (Rep) 545; [1982] 2 MLJ 59.

[29] The fact that the exact sums due under the assignment could not be ascertained at the time of the assignment, because the lawful deductions to be made from the balance purchase price were not determined then, does not invalidate the assignment. The respondent had irrevocably instructed the stakeholder to pay the entire net proceeds of the sale under the SPA to the intervener and that is the crux of the matter. Once the stakeholder came to know or had acknowledged the instruction or intention of the assignor/respondent, they became trustee for that chose in action. See *Rossiter v. Miller* [1873] 3 AC 1124, 1151; *Palmer v. Culverwell, Brooks & Co* (1902) 85 LT 758, 759; *In Re Patrick* [1891] 1 Ch 82; and *Malayawata Steel Bhd v. Government Of Malaysia & Anor* [1980] 1 LNS 45; [1980] 2 MLJ 103.

[30] Now, in order for s. 52 of the Bankruptcy Act 1967 to apply, the liquidator needs to prove that the assignment was not made in good faith or done without valuable consideration. This was reiterated by the Federal Court in *Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor* [2016] 7 CLJ 823; [2016] 5 MLJ 1 in the following terms:

> A transfer or conveyance made during the twilight period either not in good faith or without valuable consideration is absolutely void against the liquidator.

However, there no evidence showing either that the assignment was not done in good faith or without valuable consideration. In fact, the contrary is evident, in that the assignment was made to ensure that the respondent's bank account is not frozen and that project MK20 can proceed without affecting the progress of works. And the intervener has given valuable consideration for the assignment, ie, the advance of RM5.6 million.

[31] Further, I find that the liquidator has not fulfilled all the five conditions laid down by high authority, as stated above, for the application of s. 53 of the Bankruptcy Act 1967. In particular, there is no evidence that the respondent was insolvent when the arrangement was entered into. The fact that the respondent was faced with a temporary lack of liquidity, which required the advance of RM5.6 million from the intervener, cannot be equated to insolvency. See *Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd* [2001] 4 CLJ 572; [2002] 1 MLJ 89.

[32] Further, in *Tee Siew Kai v. Affin Bank & Anor And Other Cases* [2011] 1 LNS 18; [2011] 4 MLJ 491 the court held that:

> A company which faces some financial difficulty and requires a restructuring of its banking facilities need not necessarily be regarded as insolvent.

The liquidator relies merely on the fact that the respondent needed funds to regularise its outstanding loan with Maybank Bhd to show insolvency, and that I find is insufficient. The liquidator needs to show more than that. There are no financial statements of the respondent tendered as evidence for the court to assess the general state of its financial affairs and to make a determination as to whether the respondent was insolvent when the arrangement was entered into on 7 April 2016. Hence, I find that there is absolutely no evidence showing that the respondent was insolvent at the point of time.

[33] One other requirement under s. 53(1) of the Bankruptcy Act 1967 is for the intervener to be a creditor of the respondent when the arrangement was made on 7 April 2016. I find that when the arrangement was finalised by way of the three letters dated 7 April 2016, creating the intervener's exclusive right to receive the net proceeds of the sale under the SPA, the intervener had not made the advance of RM5.6 million to the respondent. The advance was only made on 8 April 2016 after all the security arrangements were in place, hence it cannot be said that the intervener was a creditor of the respondent when the alleged undue preference was created in favour of the intervener on 7 April 2016. Thus, an arrangement made a day before the intervener became a creditor cannot be invalidated by the operation of s. 53 of the Bankruptcy Act 1967 read together with s. 293 of the Companies Act 1965. The liquidator has further relied on the proof of debt filed by the intervener after the winding up of the respondent as proof of his contention that the intervener is a creditor of the respondent. However, when the proof of debt dated 24 February 2017 is scrutinised it is abundantly clear that the intervener, whilst claiming a debt of RM13,627,694.50 from the respondent, has categorically not surrendered its rights and securities in the proceeds of the sale under the SPA that is governed by the assignment created on 7 April 2016. In the circumstance, as the intervener was not a creditor when the arrangement was made, I agree with the intervener's contention that the assignment cannot be deemed as giving preference to the intervener as this crucial requirement of s. 53(1) of the Bankruptcy Act 1967 has not been met.

[34] Lastly, in order to determine whether the arrangement was to confer the intervener a priority or advantage over other creditors in the winding-up, the court needs to be satisfied that the dominant intent to prefer was present. In *Lin Securities v. Royal Trust Merchant Bank (Asia Limited)* [1995] 1 SLR 97; [1994] 3 SLR(R) 899, CA, the Singapore Court of Appeal held:

> The authorities establish that the mere fact that a preference is shown is not sufficient to enable the court to draw the inference that preference was fraudulent. Before that inference can be drawn the court must be satisfied that the dominant motive of the debtor was to prefer the particular creditor.

The inference of dominant motive must be drawn from the facts proved and in this regard in *Lee Chao Yong v. Siteman Construction Sdn Bhd (in liquidation)* [2016] 1 LNS 1134; [2016] 5 MLJ 663 the Court of Appeal held as follows:

> The decision in *Re TW Cutts* was followed by the High Court in Singapore in *Ho Mun-Tuke Don & Anor (Liquidators of City Securities Pte) v. Oslo Finans As* [1990] 1 SLR 398; [1990] 1 SLR(R) 326. At p. 17, the court summarised the position as follows:
>
> > From the judgment of Lord Evershed it is clear that, first, the onus is upon the person who seeks to avoid the payment to prove that the payment was made with a view to preferring the recipient over the other creditors; secondly, the word 'view' was construed as synonymous with 'intention' or 'object'; thirdly, where there is no direct evidence, it is open to the court to infer such intention from the facts, but such inference should only be drawn if it is the true and proper inference, and it will not be drawn from the mere fact that the creditor was paid when others were not, and, lastly, the intention to prefer must be the dominant or principal intention.

[35] The intended purpose of s. 293 of the Companies Act 1965 and s. 53 of the Bankruptcy Act 1967 is to invalidate fraudulent preference and hence it must be construed in that context. In *Tee Siew Kai v. Affin Bank & Anor* [2011] 1 LNS 18 the court held that:

> *Section 293 of the Companies Act read in conjunction with Section 53 of the Bankruptcy Act, to my mind, cannot be construed in a mechanistic manner, but must be read in its proper context, which is to invalidate attempts at "fraudulent preference*". It should not be a mere matter of counting the dates and determining the "twilight period", and indulge in mere legal semantics with an indifferent regard to commercial reality and banking practices. It surely cannot be good law for a legal conclusion to be made dependent on the vagaries of dates merely. On the facts of this dispute, had the Supplemental Agreements and the Debentures been dated a few days earlier, they would as a simple matter of arithmetic be outside the "twilight period"... *The answer must surely lie with the question whether these have been created or made in the course of normal, genuine commercial transaction. If so, there cannot be any issue of "fraudulent preference".* Section 293 merely creates a rebuttable presumption of fraudulent preference where a charge, for example, is made within the six months from the date of presentation of the Winding-Up Petition, and it bears reiteration that all five necessary ingredients as established in *Sime Diamond* must be satisfied.
>
> (emphasis added)

[36] The evidence shows that the assignment or creation of the intervener's right to receive the net proceeds of the SPA, as contained in the three letters dated 7 April 2016, was to give security for the intervener's advance of RM5.6 million to the respondent. The undisputed facts show that the arrangement *via* the said letters of 7 April 2016 was to elevate the respondent's cash flow problem and ensure that project MK20 proceeded smoothly. The assignment was clearly to create security for payment of a

larger advance. Thus, I do not find the presence of any element of "unfairness" in the arrangement. The respondent had indeed received a larger sum of RM5.6 million as compared to the net proceeds due under the SPA, which was secured by the assignment. Hence, I find that the arrangement in the said letters of 7 April 2006 was not intended to defraud or create an unfair advantage. The benefit that flowed from the assignment to the respondent and its creditors, as compared to that of the intervener, is obviously far greater. Such greater benefit would necessarily negate any suggestion of unfair advantage. See *Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd* [2001] 4 CLJ 572; [2002] 1 MLJ 89.

[37] The undisputed facts show that the general creditors of the respondent had enjoyed a greater benefit of the RM5.6 million advance, whereas the intervener is only seeking the stakeholder sum of RM1.14 million. The purpose of the advance and the assignment was to ensure that the respondent can carry on with its business. The respondent then was under threat of their bank account being frozen and business operations being affected. In *Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd* [2001] 4 CLJ 572; [2002] 1 MLJ 89 the court found that the securities created in favour of the bank in that case was to assist the company to "regain business strength" and thus they did not fall under "undue preference". Thus, the mere creation of a security for an advance such as in this case cannot be termed as "undue preference".

[38] Further, I find that as early as 7 April 2016, the net proceeds due under the SPA has been earmarked as security payment to the intervener for the RM5.6 million advance. In such circumstance, the promise to apply the earmarked funds for a specific purpose creates a trust. The Court of Appeal in *PECD Bhd & Anor v. AmTrustee Bhd & Other Appeals* [2010] 1 CLJ 940; [2010] 5 MLJ 357 affirmed this principle and held as follows:

> ... a contractual promise to apply earmarked monies for a specific purpose create an equitable trust in those monies by way of trust based on the proposition that it is unconscionable for a man to give an undertaking and obtain money on terms as to its application and then to totally disregard the terms on which the monies were to be applied.

That decision was subsequently affirmed by the Federal Court in *PECD Bhd (In Liquidation) v. AmTrustee Bhd* [2013] 9 CLJ 841; [2014] 1 MLJ 91. Thus, the stakeholder sum which has been earmarked for a specific use, in this case as security for the RM5.6 million, becomes the subject of a trust and it binds the hands of the holder to act in accordance to that trust. Such a trust is commonly termed as a *quistclose trust*. See *Pembinaan Lagenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal* [2018] 1 LNS 172 CA. I find that from the facts disclosed, such a trust has come into being.

[39] It is trite law that the beneficial interest of a validly created trust is not affected by liquidation of a company which created that trust. Such a trust survives the company's liquidation. This principle was reaffirmed by the Court of Appeal in *Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor* [2011] 8 CLJ 269; [2012] 3 MLJ 422 in the following terms:

> The *Rayack Construction* case also failed to consider the fact that **a trust, once created, would survive the company's liquidation**. This is obvious – the monies held in trust were not its monies in the first place, and *the status of the trust does not change by virtue of the company's liquidation. Once it is found that the retention monies are trust monies, the question of preferential treatment to the respondents does not arise as the monies do not belong to the liquidation fund in the first place.*
>
> (emphasis added)

[40] Learned counsel for the liquidator submits that there is a requirement under s. 223 of the Companies Act 1965 for a "validation" order to be obtained by the intervener. Section 223 of the Companies Act 1965 reads:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

I find that this argument is untenable on the facts and applicable law. Firstly, s. 223 of the Companies Act 1965 is inapplicable because the stakeholder sum does not belong to the respondent as a result of the aforementioned assignment and trust. Secondly, the disposition of the chose in action, in this case the assignment of the net sales proceeds under the SPA, was done prior to the commencement of the winding-up.

Wherefore, I ordered that the liquidator's application in encl. 1 is dismissed and the sum of RM1,142,075.27 deposited with this court on 27 July 2017 be released to the intervener with no order as to costs.